

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIEL FERRIE,)
)
)
Plaintiff,)
) Civil Action No: 04-12068 (JLT)
v.)
)
KMAR CORPORATION,)
)
Defendant.)

**DEFENDANT'S NOTICE OF ADDITIONAL RECORD
EVIDENCE WHICH MAY BE CITED AT ORAL ARGUMENT
ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant, Kmart Corporation ("Defendant"), hereby gives plaintiff, Daniel A. Ferrie ("Ferrie"), notice that, at oral argument on Defendant's Motion for Summary Judgment, Defendant may cite additional record evidence, which is identified as follows:

1. Further excerpts from the Ferrie's deposition, at 80-83 (See Tab A); and
2. Further excerpts from the deposition of Jon Swank, at 51-52, 60-64, 73-75. (See

Tab B)

Respectfully Submitted,

KMART CORPORATION

By its attorneys,



David S. Rubin, Esq. BBO# 546213
Jeffrey M. Rosin, Esq. BBO #629216
FOLEY & LARDNER LLP
111 Huntington Avenue
Boston, MA 02199
(617) 342-4000

Dated: October 13, 2005

TAB A

Daniel Ferrie

02/28/2005

1 CERTIFIED ORIGINAL
2 LEGALINK BOSTON

VOLUME: I

1

PAGES: 1 to 199

EXHIBITS: See Index

4
5 UNITED STATES DISTRICT COURT

6 DISTRICT OF MASSACHUSETTS

7 - - - - - X

8 DANIEL A. FERRIE

9 Plaintiff

10 v. No. 04CV12068JLT

11

12 KMArt CORPORATION

13 Defendant

14 - - - - - X

15

16 DEPOSITION of DANIEL FERRIE

17 Monday, February 28, 2005

18 10:00 a.m.

19 Foley & Lardner, LLP

20 111 Huntington Avenue

21 Boston, Massachusetts 02199

22

23 Michelle Keegan, Court Reporter

24

Daniel Ferrie

02/28/2005

1 still be able to access the cash?

2 A. Right.

3 Q. And two, in order to avoid that, you were
4 going to zero out the cash by buying a Smart Plan?

5 A. Right.

6 Q. And what did Swank say to that?

7 A. I don't remember. He didn't say not to. He
8 didn't say anything to it. He was more concerned
9 about where Reeves was and why Reeves wasn't
10 involved in it.

11 Q. Okay. So after you had that conversation
12 with Swank, then what happened?

13 A. I received a call a short time later from
14 John Reeves asking me what had happened and why I
15 had called Swank.

16 Q. Okay. And what did you tell Reeves?

17 A. I explained everything I had explained to
18 Swank, what had happened -- to my knowledge, what
19 had happened. I also told him Nick was in the store
20 and that he should talk to Nick and get more details
21 on what was going on at that time.

22 Q. And did you talk to Reeves about the concern
23 that Nick had about these individuals still being
24 able to access -- you've got to wait -- still being

Daniel Ferrie

02/28/2005

1 able to access the cash?

2 A. Yes.

3 Q. And did Reeves share that concern?

4 A. He didn't indicate one way or another with
5 me, that I remember.

6 Q. Okay. And can you explain for us, if you
7 know, if their card that they had no longer has any
8 cash on it, why was there a concern that they were
9 going to be able to somehow access the cash on a
10 different cash card that they didn't have?

11 A. Because you can follow the card back to
12 every purchase. You can take that cash card and
13 find exactly what was bought, the time it was
14 bought.

15 Q. Who can?

16 A. You can call into -- You have a card. You
17 have the blank card. There is a number on the back
18 of the card. And you can call into that number and
19 you can follow the trail of purchase on that card.

20 Q. So the concern was they would call in
21 that -- onto that phone number. This is what
22 Macomber said to you?

23 A. Right.

24 Q. And did you share that same concern?

Daniel Ferrie

02/28/2005

1 A. I was of the concern that they could get the
2 money.

3 Q. So the idea was that they would be able to
4 call into this phone number and be able to figure
5 out that all of the balance -- Do you know what the
6 balance was?

7 A. I don't remember what the balance was.

8 Q. Whatever the balance was on their card had
9 been transferred to a different card?

10 A. Right.

11 Q. They could have determined that by calling
12 in?

13 A. Right.

14 Q. Could they have then -- How could they then
15 have accessed the second card?

16 A. They could have asked for the number to the
17 second card saying that they had lost it.

18 Q. I see. And so that was the concern that
19 Macomber expressed to you?

20 A. Yes.

21 Q. And then did you tell Reeves when you spoke
22 to Reeves about your idea to purchase Smart Plans
23 with the second card?

24 A. Yes.

82

Daniel Ferrie

02/28/2005

1 Q. And what did he say?

2 A. He said nothing. I told him what my concern
3 was, that we would have -- before that money
4 disappeared, when the Nashua police came, that we
5 could reverse it back -- we could reverse the sale
6 back out, cancel the sale and revert back to a card
7 if that's what they needed for the prosecution.

8 Q. And wouldn't you need to buy an item before
9 you could buy a Smart Plan?

10 A. No.

11 Q. You can buy a Smart Plan without buying --

12 A. Correct.

13 Q. You can buy a Smart Plan on nothing?

14 A. You can buy a Smart Plan. You can buy a
15 Smart Plan on anything you want.

16 Q. But you wouldn't have anything.

17 A. You can buy a Smart Plan with nothing. You
18 can buy a Smart Plan -- just blank Smart Plans.

19 Q. You can buy blank Smart Plans?

20 A. Yes.

21 Q. And is that what your idea was to do?

22 A. Yes.

23 Q. So did you go ahead and do that?

24 A. I told Nick Macomber to handle it. I didn't

TAB B

1

COPY

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
-----x

3 DANIEL A. FERRIE,

4 Plaintiff,

5 vs.

6 K MART CORPORATION,

7 Defendant.
-----x

8

9

10

11

DEPOSITION OF JON SWANK

12

New York, New York

13

Friday, June 24, 2005

14

15

16

17

18

19

20

21

22

23

24

25

ELLEN GRAUER COURT REPORTING, CO., LLC
133 East 58th Street, Suite 1201
New York, New York 10022
212-750-6434
REF: 77920

1 SWANK

2 basically, in my feedback and to my regional
3 vice president.

4 Q. At any time did you do this for
5 Mr. Ferrie? In other words, at any time did
6 you rate Mr. Ferrie or identify Mr. Ferrie as
7 promotable to the position of district
8 manager?

9 A. No, I did not.

10 Q. And why did you not, sir?

11 A. Within my district I had two
12 other candidates that demonstrated abilities
13 that would make a good district manager and
14 would have and were closer to being capable of
15 being a district manager. I would not state
16 that Mr. Ferrie would not have the ability
17 over time to be a district manager. I had two
18 other candidates that were stronger candidates
19 to be a district manager.

20 Q. And who were these individuals,
21 sir?

22 A. Branch Madill and Leslie Clark.

23 Q. And you testified previously, I
24 apologize, where Ms. Madill was the store
25 manager, correct?

1 SWANK

2 A. She was a store manager for me
3 at Brighton, Mass.

4 Q. What was her age, sir?

5 A. Once, again, the previous
6 question you asked me to guess at that. If I
7 were to guess, I would have to put her over
8 50.

9 Q. And the name of the other
10 individual, sir?

11 A. Leslie Clark.

12 Q. What was her age?

13 A. I would have to guess her age to
14 be in her mid-40s, possibly late 40s.

15 Q. At any time, sir, in your
16 communications with Mr. Ferrie, did you ever
17 mention anything to do with his age?

18 A. Not that I can specifically
19 recall.

20 Q. Did you ever refer to Mr. Ferrie
21 as old?

22 A. Not that I can specifically
23 recall.

24 Q. Even in a joking manner?

25 A. I recall that Mr. Ferrie would

1 SWANK

2 A. Yes.

3 Q. And the front end manager was
4 the manager in charge of the cashiers at the
5 front of the store?

6 A. Yes.

7 Q. And you don't have any specific
8 recollections of any communications between
9 you and Mr. Ferrie concerning smart plan
10 sales?

11 A. I do not have any specific
12 recollection. Once again in the course of my
13 job, I would speak to every store manager in
14 regards to their performance metrics and speak
15 in groups and on conference calls.

16 Q. Earlier, sir, you testified that
17 it was your assumption that Mr. Ferrie was
18 separated from K Mart for smart plan
19 manipulation. Please tell me your knowledge
20 of every fact that gave you that assumption
21 that caused you to make that assumption?

22 A. I recall that the K Mart
23 internal auditor related to me the course of
24 her investigation that she had come into
25 Braintree to complete was in regards to smart

1 SWANK

2 plan manipulation, prior to the completion of
3 that investigation I was transferred or
4 promoted from Boston to New Jersey.

5 Q. Is that the entire basis for
6 your assumption that Mr. Ferrie was separated
7 for smart plan manipulation?

8 MR. ROSIN: Objection.

9 Q. I will ask it a different way.
10 Are those all the facts that you
11 relied upon in basing or making your
12 assumption that Mr. Ferrie was separated for
13 smart plan manipulation?

14 MR. ROSIN: Objection.

15 Q. You can answer, sir.

16 A. Do I have to answer?

17 Q. If you understand the question,
18 you do.

19 MR. ROSIN: I think he already
20 answered that question. You first asked
21 him all the facts; he gave the facts and
22 you are asking him to say those are all
23 the facts again.

24 MR. WOOD: That's what I'm
25 doing.

1 SWANK

2 A. The internal auditor came into
3 Braintree and identified to me she was
4 conducting an investigation into smart plan
5 manipulation in the store. I had been moved
6 to New Jersey. As I previously testified, it
7 came to my general awareness that Mr. Ferrie
8 was separated, so my immediate assumption was
9 that it was as a result of the internal audit
10 which was taking place in regards to smart
11 plan manipulation would be the primary reason
12 for my assumption of his separation.

13 Q. When you say that would be the
14 primary reason for your assumption, are there
15 other reasons for your assumption that that
16 was the reason for Mr. Ferrie's separation?

17 A. Not that I can recall.

18 Q. Did you have any involvement in
19 the investigation concerning the alleged smart
20 plan manipulation by Mr. Ferrie?

21 A. No, I did not.

22 MR. WOOD: I will ask the
23 reporter to mark this as Exhibit 5.

24 (Plaintiff's Exhibit 5, document
25 marked for identification, as of this

1 SWANK

2 date.)

3 Q. I show you what has been marked
4 as Exhibit 5 and ask you to take a look at it.

5 A. Yes.

6 Q. Have you seen what has been
7 marked as Exhibit A previously, sir?

8 A. I don't recall specifically
9 reviewing it.

10 Q. Look at the first sentence of
11 Exhibit 5 after the date to cc from and
12 regarding sections if you could read that to
13 yourself, please, and tell me when you are
14 done.

15 A. Yes.

16 Q. Does that refresh your
17 recollection as to whether you were involved
18 in the investigation of the alleged smart plan
19 manipulation by Mr. Ferrie?

20 A. When I stated that I was not
21 involved in the investigation, I was present
22 and oversaw the store at the time of the
23 investigation, Donna Mastroeni, the auditor,
24 conducted the actual investigation of the
25 smart plan. I did not pull reports or do any

1

SWANK

2

interviews regarding this investigation.

3

Interviews would have been conducted, after I
had been promoted to New Jersey.

5

Q. What was the date of your
promotion to New Jersey?

7

A. I recall reporting to New Jersey
in the end of January of 2004.

9

Q. So then, sir, the first sentence
in Exhibit 5 is incorrect when it states that
the investigation was conducted by you among
others?

13

MR. ROSIN: Objection.

14

Q. You can answer the question.

15

A. I was present for Donna
Mastroeni's early investigations into this
case. Once, again, I did not do any of the
actual pulling, reviewing of reports or
conducting any interviews with any associates.
I would be or I was present and had the
overall responsibilities of the location at
the time Donna Mastroeni was in my store
conducting her investigation.

24

Q. When you state that you were
present for Ms. Mastroeni's initial

1 SWANK

2 asking me to relate --

3 Q. Let me ask you another question.

4 Do you recall having any

5 communications with Mr. Ferrie concerning this
6 stolen credit card?

7 A. No, I do not specifically recall
8 discussing this with him. He would refer to
9 the investigation to me via the phone when he
10 was out, and the extent of my conversation was
11 very nonspecific to the cash card.

12 Q. I want to make sure I
13 understand, so you do recall some
14 communication with Mr. Ferrie concerning the
15 stolen credit card?

16 A. The only conversation I recall
17 concerning the stolen credit card was Mr.
18 Ferrie's question to me as to the extent or of
19 the audit going on.

20 Q. And this was when Mr. Ferrie was
21 out on his Workers' Comp injury?

22 A. Yes.

23 Q. Why don't you tell me everything
24 that you recall you saying during that
25 conversation and Mr. Ferrie saying during that

1 SWANK

2 conversation concerning this audit.

3 A. I can recall speaking to Dan via
4 telephone for an update on when and if he
5 would be returning to work.

6 He questioned what was going on
7 with the audit, and I stated to the best of my
8 recollection I stated that I did not have the
9 details or could share the details of the
10 investigation with him at that time and that
11 my only condition was finding out when or if
12 he -- when or if he would be returning to
13 work.

14 Q. Do you recall anything else from
15 that conversation?

16 A. I can't recall specifically,
17 that's the general content of the
18 conversation.

19 Q. Did you have any other
20 communications with Mr. Ferrie concerning the
21 issue of this audit?

22 A. Not that I can recall. The only
23 communications I had were several telephone
24 calls from Mr. Ferrie updating me to -- as
25 updating to me his extent of what was going on

1 SWANK

2 with him and if he would be back to work.

3 Q. What do you recall of those
4 conversations?

5 A. I recall that Dan couldn't
6 really give me a concrete answer as to that he
7 would be returning to work next week or next
8 month or if it would be longer. He just
9 specifically, if I do recall, he just would
10 state that he had another doctor's visit
11 coming up, et cetera, and would know more
12 after that.

13 Q. Did this concern you?

14 A. Aside from my personal concern
15 for an individual's health that I worked for
16 and knew for a period of time I had personal
17 concerns. And I also had concerns for the
18 running of the store that I was responsible
19 for. I would have based upon the length of
20 time that he would be out, I would possibly
21 have to make a decision to bring in a
22 temporary manager to oversee the location.

23 Q. I will run through a few names
24 for you, sir?

25 A. Yes.